CALIFORNIA ASSOCIATION OF FOUR-WHEEL DRIVE CLUBS, INC.
NATIONAL OUTDOOR COALITION

IBLA 80-853 Decided December 4, 1981

Appeal from decision of California State Office, Bureau of Land Management, denying protest of decision in part designating certain land as a wilderness study area. CA-050-211.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

The Bureau of Land Management may designate an area as a wilderness study area, in accordance with sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976), even though it is traversed by a temporary road constructed pursuant to a right-of-way permit granted after the effective date of the Act where BLM has taken actions to ensure that such a grant would not result in permanent impairment of the area for suitability for preservation as wilderness.

APPEARANCES: Mark S. Allen, Esq., Washington, D.C., for appellants; Dale D. Goble, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The California Association of Four-Wheel Drive Clubs, Inc., and the National Outdoor Coalition have appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated June 25, 1980, denying their protest of a decision in part designating unit CA-050-211 (Big Butte) as a wilderness study area (WSA).

The BLM decision was made pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1976). That section provides in relevant part that: "[T]he Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 [16 U.S.C. § 1131 (1976)]." 43 U.S.C. § 1782(a) (1976). From time to time thereafter, the Secretary is required to report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. Congress will make the final decision with respect to designating wilderness areas, after a recommendation by the President. 43 U.S.C. § 1782(b) (1976).

The wilderness review undertaken by the State Office has been divided into three phases by BLM: Inventory, study, and reporting. The BLM decision marks the end of the inventory phase of the review process and the beginning of the study phase.

In their statement of reasons for appeal, appellants contend that BLM cannot designate unit CA-050-211 as a WSA because it is not "roadless" within the meaning of section 603(a) of FLPMA, supra. They point principally to a haul road constructed pursuant to a right-of-way permit issued effective May 23, 1977, by BLM to Louisiana-Pacific Corporation (L-P) for a term of 5 years. The authority for the grant was section 501 of FLPMA, 43 U.S.C. § 1761 (1976).

The road in question traverses the subject land and provides access to land which L-P uses in its timber cutting operations. The length of the road is 4.7 miles. Appellants state that the first 0.9 mile of road was "pioneered" in 1968, i.e., "roughed out * * * with heavy machinery." Construction formally began pursuant to the right-of-way permit in June 1977 and was completed in October 1977 on the remaining section of road.

The decision to issue the right-of-way permit to L-P was protested by the Citizens' Committee to Save Our Public Lands, primarily on the basis that BLM had not prepared an Environmental Impact Statement (EIS) prior to the decision. In Citizens' Committee to Save Our Public Lands, 29 IBLA 48 (1977), we affirmed BLM's decision not to prepare an EIS, concluding that it was supported by the record. On appeal, the district court also concluded that no EIS was required and affirmed our decision. Citizens' Committee to Save Our Public Lands v. Andrus (Citizen's Committee), No. C-77-633 SC (N.D. Calif. May 19, 1977).

However, the court in Citizen's Committee stated:

> Regarding plaintiff's claim under the Land Policy and Management Act of 1976 (43 U.S.C. § 1701, et seq.), the court finds the Act to be inapplicable. To fall within the Act and to be denominated a wilderness area, the area must

> meet three requirements, namely: (1) a roadless area; (2) consisting of 5,000 acres or more; and (3) contain wilderness characteristics described in the Wilderness Act of 1964. Without reaching criteria two and three, it is clear that criteria one is not satisfied. It is undisputed that the area in question contains a number of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. It was the intent of Congress to exclude from the protection of the Act areas that have roads that have been improved or built and subject to regular and continuous use. House Report No. 94-1163, 1976 U.S. Cong. & Admin. News 6623. Even assuming applicability of the Act, issuance of the right-of-way permit is not inconsistent with the provisions and policies of the Act. Moreover, assuming applicability of the Act, plaintiff has failed to exhaust its administrative remedies prior to presenting a claim under the Act before the court. See 43 U.S.C § 1701(a)(6).

Citizens' Committee, supra at 4-5. Appellants argue that, in light of the judicial decision in Citizens' Committee, BLM is "without authority" to designate the area as a WSA.

Appellants argue that the critical date for determining the roadlessness of an area is the date that BLM issues its final inventory decision regarding designation of an area as a WSA. They contend that section 603(a) of FLPMA, supra, and BLM's own inventory guidelines, "Wilderness Inventory Handbook" (WIH), dated September 27, 1978, envision that roadless is "one of the factors to be determined during the inventory." The date of the final inventory decision was January 7, 1980. At that time, appellants argue, the area included the L-P haul and "three other roads," recognized by the court in Citizens' Committee, supra.

Finally, appellants argue that BLM is not entitled "to create roadless areas in order to study them," that is, where a road is discovered during the inventory phase of the wilderness review process, BLM is not entitled to consider the potential for rehabilitating the road so that the area may be designated a WSA. Appellants state: "Certainly it may be technically feasible to [rehabilitate] * * * an area into wilderness given enough time and money. * * * [H]owever, we strongly believe such a result was never intended by Congress when it enacted [FLPMA] * * *." Appellants cite BLM Organic Act Directive No. 78-61, Change 2, dated June 28, 1979, page 3, to effect that "[i]f a route meets the inventory handbook definition of a road, it is not to be considered for rehabilitation potential."

Appellants have filed a motion for summary judgment. In view of our decision, the motion is denied.

In its June 1980 decision, BLM dealt in part with appellants' contentions herein. BLM noted the presence of the L-P haul road but stated: "Since the right-of-way is temporary and could be rehabilitated at the expiration of L-P's permit, it does not impair the area's

suitability for designation as wilderness." Appellants had also referred to an extension of the L-P road and a fire suppression access road from Jones Ridge to Butte Camp as other roads in the unit. With regard to these, BLM stated that they were outside the boundaries of the WSA.

[1] The L-P haul road does not preclude designation of unit CA-050-211 as a WSA. On the date of enactment of FLPMA (October 21, 1976) the Secretary assumed responsibility for managing potential WSA's "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c) (1976). While appellants assert that 0.9 mile of L-P's haul road was "pioneered" into this area prior to FLPMA, BLM did not grant the right-of-way permit for this road until May 1977. Appellants state the construction on the road "began on June 29, 1977, and was effectively completed in October, 1977" (Reply Brief at 4).

Therefore, appellants' argument that construction of the L-P haul road has rendered this unit unfit for wilderness designation must necessarily be premised on a finding that the Secretary failed in his obligation "not to impair the suitability of such areas for preservation as wilderness." The record does not warrant such a finding. See Union Oil Co. (On Reconsideration), 58 IBLA 166, 171 (1981). BLM reviewed the potential impacts of the road in question and determined that granting the right-of-way for a term of years and requiring the company to restore the right-of-way area to pre-grant conditions would ensure no permanent impairment. Even though the nonimpairment criteria set forth in the "Interim Management Policy and Guidelines Under Wilderness Review" (IMP), dated December 12, 1979, 44 FR 72013 (Dec. 12, 1979), were not in existence at the time of the right-of-way grant in question, reference to those criteria reveal that this grant is consistent with them. 1/

1/ The IMP makes it clear that temporary access routes may be permitted (Ch. III.A.1., 44 FR 72024 (Dec. 12, 1979)) and new rights-of-way approved (Ch. III.B.2., 44 FR 72025 (Dec. 12, 1979)) if they meet the nonimpairment criteria. The IMP provides that an activity will be considered nonimpairing if BLM determines that it meets each of three criteria (Ch. I.B.1., 44 FR 72018 (Dec. 12, 1979)):

"a. It is temporary. * * *

"b. Any temporary impacts caused by the activity must, at a minimum, be capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area (or inventory unit) as a whole by the time the Secretary of the Interior is scheduled to send his recommendations on that area to the President, and the operator will be required to reclaim the impacts to that standard by that date. * * *

"c. When the activity is terminated, and after any needed reclamation is complete, the area's wilderness values must not have been degraded so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability or nonsuitability for preservation as wilderness."

Appellants also argue on appeal that there were "three other roads" in this area (Reply Brief at 5). Appellants do not further identify these roads. However, in its protest appellants mentioned an extension of the haul road and a fire suppression access road. In his response to the protest the State Director pointed out that these roads were outside the WSA. Assuming these are two of the three "other roads" referred to by appellants, they have presented nothing on appeal to establish their location as being different from that stated by the State Director. While appellants assert that they have proof that these roads "exist in the Big Butte area" and that such roads meet the BLM definition of "road," they have not provided such information. Instead, they rely on the court decision in Citizens' Committee. The obligation of an appellant is to establish error in the decision from which an appeal is taken. The Board does not look with favor on the offer to provide information on a piecemeal basis in support of an appeal. Appellants' argument concerning other roads in the unit does not support reversal of the WSA designation.

Finally, appellants argue that the question of roadlessness was concluded by the judicial decision in Citizens' Committee, supra. We disagree. The court noted that the Big Butte area contains a "number of roads." Id. at 5. However, the court does not specify what roads are involved. Moreover, on the date of the court's decision, May 21, 1977, the initial inventory of the unit had not begun. It is not clear that the court could have known the exact boundaries of the unit at that time. 2/ Therefore, its reference to roads could have included roads located outside the unit boundaries. Also, the court recognized that application of the wilderness review provision of FLPMA was not necessary to its decision because issuance of the right-of-way permit was "not inconsistent with the provisions and policies of the Act" and that plaintiff therein had not exhausted "its administrative remedies" with regard to a claim under FLPMA. Id. at 5.

Appellants have failed to establish any error in the decision of the State Director denying their protest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge

2/ The Solicitor's Office asserts that the initial inventory began after final publication of the Wilderness Inventory Handbook on Sept. 27, 1978 (Response to Appellant's Reply at 3).

ADMINISTRATIVE JUDGE STUEBING DISSENTING IN PART:

It seems to me that inasmuch as the L-P haulroad was in existence at the time the inventory was conducted and the boundaries of the Big Butte Unit were defined, the road should have been recognized as such and taken into account. I believe it was improper to simply ignore the reality of the road as though it were not there. The fact that provision is made in the terms of the right-of-way to order the road "put to sleep" by scarification, cross-drainage, and reseeding presents a future contingency which may be considered as well, but that does not obviate the present actuality of the road.

Nonetheless, I do not regard the error as highly significant. We have recently held that the practice of excluding such roads by designating them as "non-wilderness corridors," or "cherrystemming" them is not violative of law, regulation, or Departmental policy. C & K Petroleum Co., 59 IBLA 301 (1981); National Outdoor Coalition, 59 IBLA 291 (1981). Alternatively, the unit could be divided into two units, using the road as a boundary of each.

In any event, the presence of the road does not preclude the designation of the remainder of the land as suitable for study as a potential wilderness, as appellant asserts.

Therefore, although I would have preferred to see the matter handled differently, I concede that it does not make a substantial difference.

Edward W. Stuebing
Administrative Judge